

Hearing on the Trans-Pacific Partnership

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Ed Black

President & CEO

**Computer & Communications Industry
Association**

I. Introduction

Today the Internet is the most powerful force in the global economy, and the United States has been at the center of the Internet revolution since its beginning. According to the OECD, the Internet is a “general purpose technology enabler,” which is defined as a once in a generation technology that reorganizes world economic activity and spurs productivity. In fact, the OECD expects the positive effects of the Internet to surpass those of prior general purpose technology enablers, such as the printing press, the steam engine and the electrical grid.¹

As an enabler, the Internet not only spurs growth in Internet industries, but it also enhances the productivity of other industries and creates jobs. In fact, a recent McKinsey study highlighted the transformative nature of the Internet and found that the Internet has accounted for over one-fifth of the GDP growth of mature nations over the last five years and has created 2.6 jobs for every job lost. Furthermore, 75% of the productivity increases arise from the Internet’s effect on other sectors and, more specifically, the Internet has led to a 10% increase in productivity for small and medium size businesses.²

The Internet also has had drastic effects on world trade. One prominent study found that a 10% increase in Internet penetration is associated with a 1.7% increase in service exports,³ and this effect is only likely to rise over time as the Internet becomes more and more entwined in the day-to-day business of the world. The Internet’s effect on the export potential of small businesses has also been profound. McKinsey concluded that small businesses that rely heavily on the Internet export twice as much as those that do not. More and more, the Internet is allowing small businesses access to markets that were once reserved for major multinational corporations.

The Internet industry itself is big business for America. Google with a market value of \$174 billion is the 28th most valuable business in the world, while Facebook’s estimated valuation is higher than both Citigroup and Goldman Sachs. Also, approximately half of the overall revenue generated by these companies comes from abroad, and overseas revenue has been rising faster than domestic revenue. This makes sense as the lower cost of Internet technology, particularly wireless Internet and smart devices, means that more and more of the developing world is coming online. With 420 million people online, China already has more Internet users than the entire population of the United States.⁴ For U.S. Internet companies to continue their growth, it becomes vitally important that the barriers to their expansion into overseas markets be stripped away.

¹ OECD, “Broadband and the Economy,” Ministerial Background Report, May 2007, *available online at* <<http://www.oecd.org/dataoecd/62/7/40781696.pdf>>

² McKinsey Global Institute, “Internet Matters: The Net’s Sweeping Impact on Growth, Jobs and Prosperity,” May 2011.

³ Caroline Freund and Diana Weinhold, “The effect of the Internet on International Trade,” *Journal of International Economics* 62(2004): 171-189.

⁴ Frederick Erixon and Hosuk Lee-Makiyama, “Digital Authoritarianism: Human Rights, Geopolitics and Commerce,” *European Centre for International Political Economy*, 2011.

Although the numbers referenced above are relatively new, the theme that the Internet is transforming the world is quickly becoming cliché. However, the international trade apparatus has been slow to evolve. Although the WTO opened a Work Programme on E-Commerce in the 1990s, virtually no progress has been made at updating WTO commitments to reflect the growth of the Internet. As progress at the WTO stalls, especially with the collapse of the Doha Round, the USTR needs to become a vocal force pushing for strong pro-Internet language in both bilateral and regional trade agreements. If the TPP is really going to set the gold standard for 21st century trade agreements, it must address the issues pertinent to the most dynamic element of the 21st century economy.

II. Free Flow of Information

Concerns over impediments to the free flow of information over the Internet continue to grow as communications and commerce over the Internet increase. Numerous restrictions on this flow harm U.S. trade and commerce, as well as innovation in Internet communications and services. CCIA has long advocated for the need to work with foreign governments and multilateral organizations to fully enforce existing trade agreements; close gaps in existing trade agreements in the area of Internet communications and trade; and negotiate stronger rules in future trade agreements to protect e-commerce, limit ISP liability, and stop Internet censorship.

The development of the Internet has led to a revolution in the way we conduct international commerce and trade. In the new world of electronic commerce, removing obstacles and helping trade flow as freely as possible means safeguarding the free flow of information. Government efforts to disrupt this flow should be characterized as barriers to trade, and must be addressed in trade agreements.

The United States is an information economy, and U.S. companies are leading vendors of information products and services. In this context, information discrimination by a foreign government fundamentally undermines U.S. economic interests, such as the interests of U.S. Internet companies engaged in electronic commerce seeking to access that market. Filtering American Internet content and services has the effect of filtering out American competition, and poses a clear threat to U.S. businesses' ability to deliver goods and services to overseas markets. Whether it is bananas or bytes that are stopped at the border, the economic effect on U.S. interests is the same. While CCIA maintains the view that the current trading regime already prohibits censorship, filtering, blocking, and other impediments to the free flow of information, we also believe that this needs to be made more explicit in U.S. trade policy.

This issue has been discussed this year in both bilateral and multilateral fora. In April 2011, trade negotiators from the U.S. and the E.U. issued a joint declaration on "Trade Principles in Information and Communication Technology Services," which included "Open Networks, Network Access and Use" and "Cross Border Information Flows." In

June 2011, the Organization for Economic Cooperation and Development (OECD) released (and adopted as Recommendations this month) a Communique on Principles for Internet Policymaking, calling on members to “promote and protect the global free flow of information.”

As part of a collaborative effort involving a group of associations and companies chaired by the National Foreign Trade Council, CCIA helped craft a list of Priorities for the Business Community in Promoting Cross-Border Data Flows. The priorities include:

prohibiting measures that restrict legitimate cross-border data flows or link commercial benefit to local investment; addressing emerging legal and policy issues involving the digital economy; promoting industry-driven international standards, dialogues and best practices; and expanding trade in digital goods, services and infrastructure.⁵

CCIA has long called for a framework to address the issue of information flow and to establish new rules of the road to adapt the timeless goals of the rules-based trading system to the new online reality. These priorities are a formula for that framework and need to be pursued in any trade negotiations going forward.

At the very least, U.S. policy should be to commit to the blueprint established in the Korea-U.S. Free Trade Agreement, under which parties agree to refrain from unnecessary barriers to cross-border information flows. Not only has the administration touted the Trans-Pacific Partnership as “an ambitious, next-generation, Asia-Pacific trade agreement that reflects U.S. priorities and values,”⁶ it has explicitly stated that a key feature is “to promote trade and investment in innovative products and services, including related to the digital economy.”⁷ As such, the TPP must address the issue of free flow of information, and should include making the KORUS commitment mandatory and the implementation of strong, enforceable commitments to permit the free flow of information over the Internet and the unfettered exchange of digital goods and services.

III. Balanced IP Provisions

The fastest growing sectors of the Internet rely heavily upon balanced IP law. Because the international trade regime has generally lacked flexible IP provisions to promote innovation, it is necessary to modernize the IP provisions of the aging trade framework to be consistent with Internet and high-technology innovation.

Innovative Internet and technology businesses depend on copyright limitations and exceptions just like publishers depend on copyright protection. Just as the robustness of

⁵ See <http://www.nftc.org/default/Innovation/PromotingCrossBorderDataFlowsNFTC.pdf>

⁶ Office of the United States Trade Representative, “The Trans-Pacific Partnership Framework”, available online at < <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/united-states-trans-pacific-partnership>>.

⁷ Office of the United States Trade Representative, “Outlines of the Trans-Pacific Partnership Agreement”, available online at <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>.

copyright protections may affect how strong each TPP nation's copyright-dependent industries are, the robustness of copyright exceptions will affect how successful technology and Internet industries are. The rapid, dynamic expansion of the Internet industry in the United States is in part attributable to robust U.S. exceptions and safe harbors.

These balanced IP provisions are the glue that holds together the Internet. Search engines rely on balanced copyright in order to index the web to help users find information. Internet browsers copy (without permission) copyrighted web pages onto users' computers so users can view them. ISPs make countless copies of millions of copyrighted email messages every day.

The Internet industry is not alone in depending on balanced copyright; industries depending upon the various balancing provisions in U.S. copyright law ("fair use industries") produce revenue of \$4.7 trillion, generating \$2.2 trillion in "value added" to the U.S. economy.⁸ This figure represented one-sixth of total 2007 U.S. GDP. Fully 17.5 million people – 1 in 8 U.S. workers – were employed by industries that depend upon balanced copyright. Exports of trade-related services, including Internet or online services, increased nearly ten-fold from \$578 million in 2002 to \$5.2 billion in 2007.

Copyright exceptions do not threaten author's rights. At a 2009 meeting of the World Intellectual Property Organization, a U.S. official rejected the view

"that any international consensus on substantive limitations and exceptions to copyright law would weaken international copyright law. The United States does not share that point of view. The United States is committed to both better exceptions in copyright law and better enforcement of copyright law."⁹

There is ample precedent in international law for mandatory limitations and exceptions exist in international IP law. For example, the Berne Convention *requires* that countries permit *free* quotation from published works (art. 10(1)), and also contains a mandatory exception for news of the day and press information (art. 2(8)).

Accordingly, the Trans-Pacific Partnership should contain mandatory provisions that:

1) Encourage Innovation by Promoting Fair Use.

The fair use doctrine and related limitations and exceptions provide critical protection from unjustified copyright infringement liability for innovators in information technology and Internet industries. Fair use also balances copyright protection against constitutional free speech principles and promotes education and research – essential elements for the

⁸ Thomas Rogers and Andrew Szamosszegi, *Fair Use in the U.S. Economy: The Economic Contribution of Industries Relying Upon Fair Use* (CCIA 2010), at 8-9; discussed in Shayerah Ilias & Ian F. Fergusson, United States Congressional Research Service, *IP Rights and International Trade*, (RL34292), Feb. 17, 2011, at 12.

⁹ Statement of U.S. Delegation, WIPO Standing Committee on Copyright and Related Rights, 19th Sess., Dec. 14- 18, 2009, available online at <<http://www.wo.ala.org/districtdispatch/wp-content/uploads/2009/12/WIPO-Statement.pdf>>

advancement of technology.

The Korea-US Free Trade Agreement contained such a provision in Chapter 18, footnote 11, which stated that “For greater certainty, each Party may adopt or maintain limitations or exceptions to the right described in this paragraph for fair use...” While this permissive rule indicates the right direction for future trade agreements, the merely permissive nature of the rule will lead to a patchwork of inconsistent laws, which will not provide sufficient protections for Internet and technology enterprises.

The TPP must enshrine mandatory limitations to intellectual property rights, including fair use, to provide adequate protection for online services, e-commerce platforms, device manufacturers, and ISPs.

2) Protect Innovators and Users from Unjustified Secondary Liability.

“Secondary liability” is the principle of punishing one person for another person’s misconduct. Some nations’ versions of secondary liability law aggressively penalize third parties, such as tech innovators and internet services, for the misconduct of infringers who happen to use the service in their actions. To the extent that nations elect to adopt second liability rules, it is essential to institute safe harbors that protect innovators from unjust liability.

These protections safeguard jobs and revenues associated with the flourishing technology and Internet industries. Intellectual property law should not inhibit legitimate commerce. Disharmony in international law currently results in businesses and users around the world facing liability for new business models, product features, and activities that are permitted under U.S. law.

International IP agreements must therefore contain appropriate safe harbors to ensure that online services, e-commerce platforms, device manufacturers, and ISPs are not held liable for the misconduct of other parties who use their product or service.

3) Protect the Rights of Consumers to Resell Lawfully Purchased Goods.

The Internet has not only been a boon to companies of all sizes seeking to sell their goods or services over the Internet, but it has also given consumers the ability to better participate in secondary markets where they can buy and sell previously purchased goods. In the United States, the “first sale doctrine” allows consumers to resell copyrighted works (as long as they work is being transferred and a copy is not made). As a result of the first sale doctrine, the growth of the Internet has given rise to a robust industry focused on providing consumers platforms for reselling lawfully purchased goods (as well as items made by small businesses or individual craftsmen and women).

eBay, the most well known U.S. company in this market, not only is a thriving business in its own right, with a market valuation of nearly \$40 billion, but has also created a sizable ecosystem of sellers and resellers of goods. These operations, primarily

individuals and small businesses, use such websites as eBay or Etsy as their primary (and often only) means for accessing the global marketplace. In fact, more than 700,000 people use eBay as their primary source of income and over 1.5 million more use it as a secondary source of income. Of the small businesses with employees operating on eBay, more than 30% use it as their only sales channel.¹⁰ Consequently, US trade negotiators should fight for the inclusion of the first sale doctrine into the TPP as a means of protecting and expanding market access for these important U.S. exporters.

¹⁰ See <http://investor.ebay.com/releasedetail.cfm?releaseid=170073>